From:	Sims, Charmaine
To:	OAIC - FOI DR
Cc:	FOI; Xu, Shelley
Subject:	MR22/01085 - Notice of IC review application and request for documents [SEC=OFFICIAL]
Date:	Thursday, 3 November 2022 11:29:47 AM
Attachments:	image011.jpg image012.png image013.png image014.png image015.png Attachment 1 - LEX 41 - Original FOI Request.pdf Attachment 2 - LEX 41 - Search result.pdf Attachment 3 - LEX 41 - Document 1 (exempt in full).pdf Attachment 4 - LEX 41 - Document 2 (exempt in full).pdf Attachment 5 - LEX 41 - Decision notice.pdf Attachment 6 - LEX 111 - Internal Review Request.pdf Attachment 7 - LEX 111 - Executive brief to decision-maker.docx

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OFFICIAL

Dear Jennifer

OAIC ref: MR22/01085 | APSC ref: LEX 344

We refer to your notice of Information Commissioner Review (**IC Review**) and request for documents below.

On 26 October 2022, the OAIC granted the Commission's request to submit a confidential submission.

This version of the submission does not contain any confidential information and can be provided to the Applicant.

Scope of IC Review

1. This IC Review application concerns an Internal Review (**IR**) decision made by Marco Spaccavento of the Australian Public Service Commission (**the Commission**) on 19 May 2022.

2. We understand the Applicant is seeking IC Review because the Commission 'refused access to documents or parts of documents requested.'

3. The Applicant provides an explanation for why they believe the decision is incorrect, extracted below:

> *'I disagree with the decision because the answer to my FOI request is that no documents were provided to Kate McMullan of the Australian Public Service Commission which support her conclusion that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load";*
>
> *'The decision is wrong because the documents that Mr Spaccavento claims were provided to Kate McMullan of the Australian Public Service Commission which support her conclusion that allegations of impropriety and, presumably, unlawful*

conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been a "role review process that resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load,' do not, in fact, support Ms McMullan's conclusion'; and

'For the reasons I set out in my internal review request, the Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia is not a document that supports Ms McMullan's conclusion that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load." The Judicial Registrar Recruitment Outcome document prepared by Federal Court of Australia is a document that sets out certain content about the allocation of classifications to successful candidates under rule 6 of the Public Service Classification Rules 2000. It also demonstrates unlawful conduct because it shows that Murray Belcher and Russell Trott, both of whom were selected for the SES Band 1 "National Judicial Registrar & District Registrar" roles, those roles having been classified as SES Band 1 roles under rule 9 of the Public Service Classification Rules 2000, were impermissibly denied their lawful classifications under rule 6. There are notations on that document, next to Mr Belcher's and Mr Trott's names stating "No SES" and "NO SES BUT DR [Distract Registrar] IFA" respectively.'

4. At the outset, the Commission submits the scope of IC review advised by the Applicant is incorrect. Whilst the Commission did refuse access to two documents in full, the Applicant's contention is not that the Commission should have released these documents, but rather that the Commission did not interpret the request correctly and there should in fact be no documents in scope of the request. To support this, the Applicant refers to a separate FOI decision made by a different agency which appears to be inconsistent with the Commission's IR decision.

5. Ultimately, this IC Review is concerned with whether the Commission interpreted the scope of the request correctly.

Commission submissions

6. The Commission submits the scope of the request was interpreted correctly.

7. This FOI request concerns documents that were provided to Kate McMullan to support her conclusion in a Public Interest Disclosure (PID) investigation.

8. The Commission notes the decision-makers at both the primary and IR decision stages were not involved in the PID investigation and would not be aware of how Kate McMullan used the documents provided to her to investigate the PID. Therefore, the decision-makers took a **common sense interpretation** of the terms of the request and interpreted the request to mean documents that were provided to Kate McMullan that **may have** been used by her to come to her conclusion.

9. Paragraph 11 of the IR decision provides commentary to this effect:

*'Despite the name of the document "Judicial Registrar Recruitment," the material within that document also contains information that Ms McMullan **may have** relied upon to conclude that a role review process had occurred. That is, document 2 contains material concerning recruitment outcomes and information that could be used in a role review. I hope this clarifies the issue for you.'*

10. The Commission submits that this interpretation of scope at both the primary and IR decision stages was reasonable, given the decision-makers had no involvement in the PID investigation, and providing further detail about whether Ms McMullan used the documents in the PID investigation would be in contravention of secrecy provisions under the PID Act.

11. Further, the Commission submits it is not up to FOI applicants to determine what documents should fall within scope of a request. Under section 23 of the FOI Act, it is up the decision-maker, as the authorised person, to assess whether documents are in scope of a request. Separate FOI decisions made by different agencies are not relevant for the purpose of this IC Review, which deals with how the Commission's decision-makers have assessed documents held by the Commission.

12. The original FOI request was for:

> '*all the documents […] that were provided to Kate McMullan […] which support her conclusion that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because here had been a "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load."*

13. For context, 'role evaluation' is the method of determining the relative work value of a job (role) through assessing the nature, impact and accountabilities of the job. Whilst the APS Classification Guide sets out the process for a role evaluation, it does not prescribe how it must be conducted and documented.

14. Document 1 (Email correspondence between the Commission and Federal Court of Australia titled 'PRIVATE AND CONFIDENTIAL' dated 27 October 2020) is an email chain between Ms McMullan, Sia Lagos and Scott Tredwell during the course of the PID investigation. The email contains information that Ms McMullan may have relied upon to conclude that a role review process had occurred.

15. Determining the relative work value of the job (or role) is required for the purpose of a role evaluation. Therefore, the Commission submits the document is in scope of the FOI request as it can reasonably be considered that Ms McMullan relied on the document to come to the conclusion that a role review occurred.

16. Document 2 (*Judicial Registrar Recruitment Outcome*) was prepared by the Federal Court in the context of a recruitment process and was provided to Ms McMullan during the course of a PID investigation. The Commission acknowledges the primary purpose of the document is not for a role review. However, in the Commission's view, this document provides the elements required at a high level for a role review to be conducted. Therefore, the Commission is satisfied this document is within the scope of the request as:

    - it was provided to Ms McMullan as part of the PID investigation; and
    - it was open to Ms McMullan to come to the conclusion that a role review had occurred based on this document.

Requested documents

17. The Commission provides the below listed documents in response to this request:

Attachment	Date	Description
1	21 March 202	LEX 44 - Original FOI request
2	31 March 2022	LEX 44 - Search result
3	N/A	Document 1 (exempt in full)
4	N/A	Document 2 (exempt in full)
5	2 May 2022	LEX 44 - Original notice of decision
6	7 May 2022	LEX 111 - Internal Review request
7	17 May 2022	LEX 111 - Executive Brief to decision-maker providing rationale for decision

Further information

[redacted] It appears these types of requests were made after the *Australian* published articles about an investigation by the Commission into a Federal Court recruitment process. IR requests from this Applicant have been unusual in that they often do not seek access to information that was redacted or withheld, but instead assert their request was not adequately addressed and the Commission has not given access to all documents to which the request relates.

Please feel free to contact me should you require any further information.

Kind regards,

Charmaine

[Signature block]

From: OAIC - FOI DR <foidr@oaic.gov.au>
Sent: Thursday, 13 October 2022 11:57 AM
To: FOI <FOI@apsc.gov.au>
Subject: MR22/01085 - Notice of IC review application and request for documents [SEC=OFFICIAL]

Our reference: MR22/01085
Agency reference: LEX111

FOI Contact Officer
Australian Public Service Commission

By email: foi@apsc.gov.au

Notice of IC review application and request for documents

Dear FOI Contact Officer

Please find attached the notice of IC review and request for documents.

Please note, the Information Commissioner will share the submissions you provide during IC review with the applicant unless there are compelling reasons not to. However, we do not

provide the applicant with copies of the documents at issue. Should you wish to provide submissions in confidence, please refer to the IC Review Procedure Direction which sets out the process for making such a request.

Kind regards

Jennifer Zhou

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